AND
BRIEFS

No. 10-1256

Supreme Court, U.S.
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In The
Supreme Court of the United States

BILL CHAN,

Petitioner,

v.

CRAIG T. LUND, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The California Court Of Appeal Sixth Appellate District

REPLY TO BRIEF IN OPPOSITION OF RESPONDENT NORMA TREE SERVICE

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INTRODUCTION

California Evidence Code sections 1119 and 1123 led Petitioner to suffer a violation of his due process rights by allowing confidentiality to extend even to the circumstances of his attorney's coercion of him in mediation. As a result, Petitioner lost his property interests in his causes of action without notice or opportunity to be heard before judicial enforcement of the mediation settlement agreement.

Respondent Norma Tree's statements here in opposition have no merit. Petitioner does not seek an advisory opinion, Resp't Opp'n to Pet. at 1, and certainly does not ask the Supreme Court of the United States to determine whether Petitioner was extorted by his attorney. Resp't Opp'n to Pet. at 12. Petitioner presents to this Court a compelling and reviewable issue.

Respondent Norma Tree seeks to distract attention from the due process violation by asserting that no order specifically cited these California Code sections. All parties were well aware that these statutes applied and that their application led to the result brought to this Court's attention. The Respondent Lunds' Brief in Opposition to the Petition, for example, attached the "Acknowledgment Regarding California Evidence Code" in its Appendix at page 3b, which specifically states that "the confidentiality provisions of Sections 1115 through 1128" applied to the mediation. The judges of all lower courts applied these statutes in forming the order and opinion

appealed from here. *See* App. to Pet. at 2, 6, 12-13, 33; Chan v. Lund, No. 106-CV-072392, Hr'g Tr. at 14:1-14:2. (Cal. Super. Ct. Mar. 11, 2009) ("I don't think ***in the law*** the defendants lose their deal.") Emphasis added.

ARGUMENT

I. Petitioner Did Suffer Injury In Fact.

Respondent Norma Tree claims Petitioner was not harmed because "Petitioner was never precluded from presenting evidence from the mediation to support his claim." Resp't Opp'n to Pet. p. 8.

Later, Respondent Norma Tree contradicts itself, stating that "[t]he only authentication" of Petitioner's conversation with the attorney who coerced him was Petitioner's declaration, a declaration "riddled with hearsay." Resp't Opp'n to Pet. p. 9. Naturally, due to the mediation confidentiality law, Cal. Evid. Code §§ 1119; 1123, Petitioner's declaration was the only admissible evidence of Petitioner's conversation with his attorney. Under California's mediation confidentiality law, any authentication of Petitioner's word was impossible. This is precisely the due process violation caused by the California statutes as applied. Indeed, it would render mediation entirely untrustworthy and unappealing if any party could later rescind a mediation settlement agreement based on his declaration alone. Respondent Norma Tree only makes clear the impossible position of Petitioner. This position is an as-applied due process violation, legitimately and importantly posed for this Court's review.

Furthermore, counsel for the Lunds and counsel for Respondent Norma Tree stated in the record that Petitioner was able to present only allegations and speculation. Counsel for the Lunds first stated:

> **Mr. Sunseri**: What we still have is Mr. Chan's allegation, *and that's all it is*, Mr. Chan's *allegation* with regard to some duress *supposedly* imposed on him by Mr. Packard.
>
> Chan v. Lund, No. 106-CV-072392, Hr'g Tr. at 8:17-19 (Cal. Super. Ct. Mar. 11, 2009). Emphasis added.

Counsel for Respondent Norma Tree stated:

> **Ms. Ballon**: I want to echo Mr. Sunseri's statements, Your Honor, that there's no corroborating evidence that this in fact was procured under duress. It's simply to date is *still an allegation*. There's been no evidence of the fact it took place that way. To say that Mr. Kelly will testify this way or that is *speculation*. It's *also questionable whether such testimony would even be admissible under the mediation privilege*. . . .
>
> Chan v. Lund, No. 106-CV-072392, Hr'g Tr. at 9:20-27 (Cal. Super. Ct. Mar. 11, 2009). Emphasis added.

Under the California Evidence Code sections 1119 and 1123, it would have been impossible for Petitioner to seek and introduce evidence to corroborate his declaration, unless all parties waived mediation confidentiality. Counsel for Petitioner stated that Petitioner would waive if the others would waive:

> **Mr. Tichinin**: I will certainly, and Mr. Chan will certainly, waive that privilege to allow Mr. Kelly to testify if both other parties will waive it as well.
>
> Chan v. Lund, No. 106-CV-072392, Hr'g Tr. at 11:2-4 (Cal. Super. Ct. Mar. 11, 2009).

All other parties did not waive. Judge Cabrinha denied the second ex parte application.

Clearly, Petitioner did not have "every opportunity" as Respondent Norma Tree falsely concludes, Resp't Opp'n to Pet. at 9, although he took every opportunity he could take under the California law at issue here.

Respondent Norma Tree also erroneously concludes that the court did consider the proposed testimony, thereby resulting in no injury in fact. *See* Resp't Opp'n to Pet. at 4. When Judge Cabrinha denied Petitioner's second ex parte application he could not have been assuming, as Respondent suggests, the receipt of *admissible* evidence *proving* that Petitioner's attorney coerced Petitioner to attend mediation involuntarily and to sign the settlement agreement involuntarily. Judge Cabrinha would then have been judicially enforcing an agreement *proven* to have been coerced and extorted. Judge Cabrinha must have been assuming the existence of the evidence, but nevertheless, applying the California Evidence Code sections 1119 and 1123, realized that the evidence would be inadmissible. In fact, he said, "I don't think ***in the law*** the defendants lose their deal." Chan v. Lund, No. 106-CV-072392, Hr'g Tr. at 14:1-14:2. (Cal. Super.

Ct. Mar. 11, 2009). Emphasis added. This likewise contradicts Respondent Norma Tree's assertion that the trial court never applied the mediation confidentiality statutes. Resp't Opp'n to Pet. at 8. Without expressly citing them, Judge Cabrinha did clearly apply them.

Petitioner did suffer a true injury in fact. Procedural due process injuries occur at the moment that notice and a meaningful opportunity to be heard are lost regarding the taking of property interests by state action. The injury to Petitioner took place on the application of California Evidence Code sections 1119 and 1123 to his circumstances of involuntary participation and signature to a mediation settlement agreement.

The analogy to *Mullane v. Central Hanover Bank*, 339 U.S. 306 (1950) (*Mullane*) on this procedural due process violation is sound. Respondent reads *Mullane* extremely narrowly, identifying the issue solely as one of the constitutional validity of notice by newspaper publication. Petitioner's case should be considered under the reasoning of *Mullane* because the question here, as in *Mullane*, is whether specific state statutes have allowed the procedural due process rights of a person with a protectable property interest to be cut off.

Also notable are the protectable property interests in each case. In *Mullane*, the trust beneficiaries had property rights not only in their financial assets, but in potential negligence causes of action against the

fiduciaries. The rights to notice and opportunity to pursue these claims were cut off by the statutory scheme allowing for notice by newspaper publication only. Here, Petitioner also had property interests in his causes of action. His property interests were also cut off by state statutes. As this Court summarized,

> [In] the *Mullane* case itself, . . . the Court held that a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause. There, the Court confronted a challenge to a state law that provided for the settlement of common trust fund accounts by fiduciaries, upon notice given through newspaper publication. The effect of the statute was to terminate 'every right which beneficiaries would otherwise have against the trust company . . . for improper management of the common trust fund.' Id., at 311, 70 S.Ct., at 655. This, the Court concluded, worked to deprive the beneficiaries of property by, among other things, 'cut[ting] off their rights to have the trustee answer for negligent or illegal impairments of their interests.' Id., at 313, 70 S.Ct., at 656. Such a result was impermissible unless constitutionally adequate notice and hearing procedures were established before the settlement process went into effect. Id., at 315, 70 S.Ct., at 657.
>
> * * *
>
> This conclusion is hardly a novel one. The Court traditionally has held that the Due Process Clauses protect civil litigants who

> seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances.
>
> Logan v. Zimmerman Brush Co., 455 U.S. 422, 428-429 (1982).

In direct conflict with this Court's holding in *Logan*, *supra*, 455 U.S. at 428-429, the California Supreme Court has just ***categorically*** held that "mere loss of evidence pertinent to the prosecution of a lawsuit for civil damages does not implicate such a fundamental interest" as does the loss of evidence in criminal defense. Cassel v. Wasserman, 51 Cal.4th 113, 135 (2011). Despite the potentially complete cutting off of one's pursuit of protectable property interests, as has occurred here, the California Supreme Court found no "due process concerns so fundamental" to make an exception to mediation confidentiality. *Id*.

In fact, Petitioner's property interests were affected more dramatically than in *Mullane*. In *Mullane*, the trust beneficiaries with known addresses did at least have some chance, however remote, to notice the newspaper publication and take action. Petitioner has had absolutely no opportunity to be heard on the highly improper loss of his causes of action.

In *Mullane*, the constitutionally defective statute allowed for the trustee of the property interests to put those property interests in jeopardy unbeknownst to the trust beneficiaries. Similarly here, the California statutes at issue allow for an attorney to put his

client's property interests in jeopardy, unbeknownst to the client because the client does not realize that attorney misconduct, including duress and extortion, will be rendered absolutely privileged. Respondents may argue that Petitioner signed an acknowledgment of the application of the California Evidence Code, but any reasonable party would not predict the horrible sequence of events as has occurred here, and would not consider the acknowledgment to be a waiver of any constitutional rights. Any reasonable party would expect confidentiality to bar him or her from using anything said in the future pursuit of their claim should mediation fail. He or she would not reasonably expect mediation confidentiality to force relinquishment of causes of action.

Petitioner lost his causes of action through judicial enforcement of a mediation settlement agreement. His opportunity to be heard on the loss of those property interests was cut off by the California Evidence Code sections 1119 and 1123. Judge Cabrinha knew that Petitioner's rights to seek evidence (and thereby possibly restore Petitioner's involuntarily relinquished causes of action) were cut off by these statutes. Applying the same, Judge Cabrinha denied Petitioner's second ex parte application. Thus, Petitioner's case is both compelling and proper for this Court's review.

II. Respondent Falsely Accuses Petitioner of Misrepresenting The Record.

Respondents themselves acknowledged, via counsel, that Petitioner was only permitted to present an

allegation and speculation thereon. *See* section I, *supra*. Respondent Norma Tree acknowledged this in their opposition as well. *See* section I, *supra*.

III. It Is Well-Known That California's Mediation Confidentiality Law Is Strict, And That Its Strict Nature Poses Broad-Spanning Problematic Consequences, Here A Due Process Violation.

First, Respondent Norma Tree again makes the flatly false statement that "Petitioner was not precluded from presenting evidence from the mediation on account of California's 'strict' mediation confidentiality statutes." Resp't Opp'n to Pet. at 12. It is obvious that this is exactly what happened. *See* section IV, *infra*; *see* also section I, *supra*, in which counsel for Respondents repeatedly admitted that Petitioner could present only his allegation and speculation via his declaration; *see* also Cal. Evid. Code §§ 1119, 1123; *see* also Cal. Evid. Code § 1127, which would have subjected Petitioner to attorney's fees and costs had he attempted to subpoena the mediator, Mr. Kelly; *see* also Chan v. Lund, No. 106-CV-072392, Hr'g Tr. at 14:1-14:2. (Cal. Super. Ct. Mar. 11, 2009) in which Judge Cabrinha concluded on granting defendants' motion to enforce the settlement agreement: "I don't think ***in the law*** the defendants lose their deal."

Second, Respondent Norma Tree is mistaken regarding the impact of this case. The California courts

alone have been repeatedly faced with a string of problems resulting from California's strict mediation confidentiality law, including due process concerns. *See* Cassel v. Wasserman, 51 Cal.4th 113 (2011); Porter v. Wyner, 250 P.3d 180 (2011), *vacated and transferred to Ct. of Appeal in light of* Cassel v. Wasserman, *supra*; Simmons v. Ghaderi, 44 Cal.4th 570 (2008); Wimsatt v. Superior Court, 152 Cal.App.4th 137 (2007); Fair v. Bakhtiari, 40 Cal.4th 189 (2006); Rojas v. Superior Court, 33 Cal.4th 407 (2004); Foxgate Homeowners' Ass'n v. Bramalea California Inc., 26 Cal.4th 1 (2001); Rinaker v. Superior Court, 62 Cal.App.4th 155 (1998).

The 2007 California Court of Appeal decision in *Wimsatt v. Superior Court*, *supra*, 152 Cal.App.4th 137 which reluctantly legalized malpractice in mediation due to the strictness of the same statutes at issue here stated that there should be specific warnings before parties enter mediation:

> In light of the harsh and inequitable results of the mediation confidentiality statutes (Evid. Code, § 1115 et seq.), such as those set out above, the parties and their attorneys should be warned of the unintended consequences of agreeing to mediate a dispute.
>
> Wimsatt v. Superior Court, 152 Cal.App.4th at 164.

This same decision illustrated the impact of California's mediation confidentiality statutes:

The inequities of California's mediation statutes have not gone unnoticed. Peter Robinson, the associate director of the Straus Institute for Dispute Resolution and assistant professor of law at Pepperdine University School of Law, has gathered a number of cases across the country in which courts have been asked to enforce or avoid mediated agreements. He suggests strict confidentiality (such as codified in Evidence Code section 1115 et seq.) results in absurd enforcement, when contrasted with another approach to the enforcement of mediated settlements. The nonexhaustive list of cases includes situations raising arguments about whether a mediated agreement was reached, whether there was fraud, duress or mistake, and whether the agreement violated public policy. The *situations include cases where a party was lied to by her own attorney*, the mediator, and a third party; a scrivener's error in a mediated settlement lead to a $600,000 windfall to one party; *parties claimed their own attorney coerced them into signing a settlement agreement*; a mother waived parental rights; and the parties agreed to perform an illegal act in the mediated agreement. (Robinson, Centuries of Contract Common Law Can't Be All Wrong: Why the UMA's Exception to Mediation Confidentiality in Enforcement Proceedings Should be Embraced and Broadened, 2003 J.Disp. Resol. 135.)

As Professor Robinson notes, *a strict approach to mediation confidentiality often prevents courts from "exploring and justly deciding*

> *controversies that might arise out of mediated agreements."* (Robinson, Centuries of Contract Common Law Can't Be All Wrong: Why the UMA's Exception to Mediation Confidentiality in Enforcement Proceedings Should be Embraced and Broadened, supra, 2003 J.Disp. Resol. at p. 138, fn. omitted.) The California cases we discussed above are illustrative. *They have allowed to go unpunished sanctionable conduct that frustrated the purpose of mediation* (Foxgate, supra, 26 Cal.4th 1, 108 Cal.Rptr.2d 642, 25 P.3d 1117), *foreclosed litigants from gathering evidence that might prove toxic molds and other microbes created health hazards* (Rojas, supra, 33 Cal.4th 407, 15 Cal.Rptr.3d 643, 93 P.3d 260), *precluded a propria persona litigant from proving the terms of a mediated agreement* (Eisendrath, supra, 109 Cal.App.4th 351, 134 Cal.Rptr.2d 716), *and shielded from view evidence of criminal conduct* (Doe 1, supra, 132 Cal.App.4th 1160, 34 Cal.Rptr.3d 248).
>
> Wimsatt v. Superior Court, *supra*, 152 Cal.App.4th at 163-164, emphasis added.

Most fundamentally here perhaps is the fact that this new form of settlement agreement, an agreement which is statutorily authorized, court-ordered, and court-sponsored, has been enforced by a court of law. It demands, on that basis alone, that a due process analysis be performed. *See* Shelley v. Kraemer, 348 U.S. 1 (1948).

IV. The Court of Appeal's Decision Was Unsound Given The Trial Court's Actual Application of California's Mediation Confidentiality Law.

First, Respondent Norma Tree itself apparently disagrees with the Court of Appeal on at least one point. Respondent Norma Tree states that an offer of proof was made, Resp't Opp'n to Pet. at 4, while the Court of Appeal called Petitioner's offer of proof a mere "offer of hope." Pet. App. at 35, n. 27.

Second, the Court of Appeal wrongly avoided Petitioner's due process claim by finding that no specific order excluded the evidence Petitioner sought to introduce. Pet. App. at 35. This was far from an academic or theoretical issue. Inherent in the order granting defendants' motion to enforce, Pet. App. at 39-42, was the exclusion of the evidence on Petitioner's offer of proof, an offer of proof which Respondent Norma Tree agrees was made. Resp't Opp'n at 4.

The key words Judge Cabrinha spoke on granting defendants' motion to enforce were:

> **The Court**: Let's assume we have that testimony from Mr. Kelly entirely supporting the plaintiff's claim. I don't think ***in the law*** the defendants lose their deal."
>
> Chan v. Lund, No. 106-CV-072392, Hr'g Tr. at 13:28-14:2. (Cal. Super. Ct. Mar. 11, 2009.) Emphasis added.

That law referenced was California Evidence Code sections 1119 and 1123. Judge Cabrinha applied it in

his decision to enforce the settlement agreement. The Court of Appeal upheld that application. No specific order was necessary, nor should be necessary, lest this case become one capable of repetition, but evading review.

CONCLUSION

State law permitting judicial enforcement of a coerced settlement agreement is indeed a compelling issue. Broadly, this case asks whether certain abuse in civil dispute resolution will be sanctioned by the law. Specifically, this case asks whether it is constitutional to deny to an involuntary participant and involuntary signatory to a mediation settlement agreement any meaningful opportunity to prove the involuntary means by which that settlement agreement was reached before it is enforced by a court of law. Application of California's mediation confidentiality law has cut off Petitioner's meaningful opportunity to do so, thereby depriving him of his property interests without due process of law.

Respectfully submitted,

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